

STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE 820 NORTH FRENCH STREET, 11TH FLOOR

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LEGAL MEMORANDUM 83-114

TO:

ALL JUSTICES OF THE PEACE, STATE OF DELAWARE

ALL CHIEF CLERKS, JUSTICE OF THE PEACE CIVIL COURTS

FROM:

NORMAN A. BARRO

CHIEF MAGISTRAT

Rescinded

10-17-95

DATE:

RE:

NOVEMBER 15, 4983

APPEALS FROM CIVIL ACTIONS OF DEBT, TRESPASS OR REPLEVIN;

QUESTIONS AND ANSWERS

Several recurring questions persist with regard to civil appeals. This Legal Memorandum attempts to clarify the issue by way of raising the most frequently voiced questions regarding same and by providing answers to said questions.

* * * * *

Question 1: Does the 15 day appeal period of 10 Del.C., §9571(a) apply with regard to a Justice of the Peace Court judgment on a debt, trespass or replevin action when the losing party files in a timely manner a Justice of the Peace Court Civil Rule 20(b) motion or, with regard to a debt action, a motion to vacate the judgment pursuant to 10 Del.C., §9538?

Ten <u>Del.C.</u>, §9571(a) states as follows:
"(a) An appeal shall be allowed by the justice at any time within
15 days from the day of giving the judgment and not after, counting
that day as one, upon the party entitled to the appeal or his agent
or attorney praying it."

Answer: Yes. From a reading of cases such as Ney v. Polite. Del.Supr., 399 A.2d 527 (1979), P.H. Coustenis, Inc. v. Penn Valley Plywood, Inc., Del.Supr., 388 A.2d 1199, No. 174, 1977, Order of the Supreme Court dated July 15, 1978, and Swann v. Carey, Del.Supr., 272 A.2d 711 (1970), it is clear that an appeal to the Superior Court from an order denying a Rule 20(b) motion or from an order denying a motion to vacate a default judgment brought under 10 Del.C., §9538 "permits only review of the magistrate's order denying relief . . . " Ney v. Polite, supra. No review of the underlying judgment is permitted by such appeals when the 15 day appeal period from the date of the underlying judgment has expired. In brief, the losing party must choose between appealing the judgment to the Superior Court within 15 days from entry thereof, 10 Del.C., §9571(a), or moving the Justice of the Peace Court to vacate or otherwise open the judgment pursuant to 10 Del.C., §9538 or Rule 20(b). The choice is, admittedly, a Hobson's choice, since by opting for the latter, the former will usually be precluded by virtue of the running of the 15 day appeal period from the date of the underlying judgment.

Rule 20(b) states specifically that: "A motion under this paragraph does not affect the finality of a judgment or suspend its operation. Language in Rule 60(b) of the Court of Chancery Rules is identical. Commenting on that language in <u>Swann v. Carey</u>, <u>supra</u>, the Delaware Supreme Court stated:

". ..[A]n application to the Court under this subdivision does not extend the time for taking an appeal, as distinguished from a motion for new trial. The Courts are in accord. An order refusing relief under

Rule 60(b) [or Rule 20(b) of the Justice of the Peace Court Rules of Civil Procedure] is itself an appealable order, but the appeal brings up only the correctness of the order; it does not permit the appellant to attack the underlying judgment for an error which he could have complained of on appeal from it."

From the above, we see that motions for new trial and motions to alter or amend judgment brought under Rule 20(c), (d) or (e) of the Justice of the Peace Court Rules of Civil Procedure stand on a different footing from a Rule 20(b) motion or a motion to vacate judgment brought under 10 Del.C., §9538. Motions brought under Rule 20(c), (d) or (e) extend the time for taking an appeal from the underlying judgment. If such a motion is denied, the 15 day appeal period commences to run from the date of the order denying said motion, and the appeal will permit the appellant to attack the underlying judgment by way of a trial de novo in the Superior Court. The rationale for distinguishing these motions from Rule 20(b) motions or motions to vacate judgments is as stated in 7 Moore's Federal Practice, para. 60.29 and para. 60.30 as follows:

"A timely motion [to alter or amend the judgment] or [for a new trial] destroys the finality of a judgment for purposes of appeal, and the full time for appeal commences to run anew from the entry of an order disposing of the motion and restoring finality. To be timely the motion [to alter or amend judgment or for a new triall must be made within a short time -- not later than 10 days -- after entry of judgment. A motion for relief under [Rule 20(b)] is quite different. [Rule 20(b)] states 6 grounds for relief; [and] makes all of these subject to a reasonable time limitation. . . Because of the more extended time periods applicable to a [Rule 20(b)] motion, sound policy dictate[s] that the [Rule 20(b)] motion should not affect appeal time.

Unlike a motion for new trial . . . or to alter or amend a judgment . . ., a motion for relief under [Rule 20(b)] does not affect the finality of a judgment and hence does not toll the time for appeal from the final judgment.

* * * * *

A timely motion for a new trial . . . or to alter or amend the judgment . . . destroys the finality of the judgment for purposes of appeal; and, when the motion is denied and the finality of the judgment restored, the appeal should normally be from the judgment and not the order denying the motion.

But a motion for relief under [Rule 20(b)] does not affect the finality of the judgment or suspend its operation . . . An order denying a [Rule 20(b)] motion is a final order and appealable as such. While the denial order brings up for review the matters pertinent thereto, it does not bring up the judgment for review."

Question 2: What are the security requirements for an appeal from a Justice of the Peace Court judgment on a debt action to the Superior Court?

Answer: The security requirements are as stated in 10 Del.C., §9571(b), (c) and (d). These subsections read as follows:

- "(b) The party appealing shall offer security in such sum as the justice deems sufficient to cover the judgment appealed from and the costs on the appeal.
- (c) An appeal shall be allowed to executors or administrators without security.
- (d) When the plaintiff is the appellant and no counterclaim is involved, such plaintiff need offer no security to cover the judgment appealed from or the costs; provided, that the costs of the proceedings before the justice are paid before the appeal is taken and the advance deposit for costs provided in the Superior Court Rules is made."

As to the type of bond required, 10 Del.C., §9572 leaves no doubt that a surety bond is the bond which is required. The purpose of §9572 is to protect the amount of the judgment and to obtain assurances from a surety that the appeal will be presented with effect and that any judgment rendered against the appellant in excess of the stated bond will be paid. Trala v. Melman Indust., Inc., Del.Super., 254 A.2d 249 (1969). Section 9572 is a jurisdictional statute; if not complied with, the appellate court has no jurisdiction to entertain the appeal. Adenski v. Ruth, Del.Supr., 229 A.2d 837 (1967); State ex rel. Caulk v. Nichols, Del.Supr., 281 A.2d 24 (1971). The use of quotation marks in §9572 is indicative of the fact that the form, as prescribed, is expected to be followed. Johnson v. Maykowski, Del.Super., 41 A.2d 464 (1945); Wright v. Shaw, Del.Super., 188 A.2d 669 (1963). Thus, in the case of Ramunno v. Jaremchuk, Del.Super., 5203 Civil Action 1976; letter opinion by Judge Balick dated August 4, 1976, a certified check was rejected as proper security for an appeal from a Justice of the Peace Court civil debt action. Judge Balick stated:

"Plaintiffs seek a writ of mandamus ordering a Justice of the Peace to accept their certified check as security on appeal. The statutes governing appeals provide not only that, 'the party appealing shall offer security in such sum as the justice deems sufficient to cover the judgment appealed from and the costs on the appeal,' but also the specific kind of security that must be given; namely, a surety bond executed by someone other than the appellant. 10 Del.C., §§9571(b), 9572(a). These statutes do not provide for a cash deposit as an alternative to a surety bond. S. & S. Builders, Inc. v. Eagle Truck Transport, Inc., Del.Super., 103 A.2d 558 (1957);

Trala v. Melmar Industries, Inc., Del.Super., 254 A.2d 249 (1969). Nor may a Justice of the Peace accept an appellant's certified check without the required surety bond as security on appeal.

It is ORDERED that a writ of mandamus is DENIED."

Thus, we see that a losing <u>plaintiff</u> in a Justice of the Peace Court debt action is not required to post a surety bond in order to perfect his appeal. 10 <u>Del.C.</u>; §9571(d). On the other hand, if the appellant was the defendant before the Justice of the Peace, he must post a bond executed by a surety. A bond may also be posted by an individual other than the appellant who owns a sufficient amount of real property. 10 <u>Del.C.</u>, §§9571; 9572. At a minimum, the value of the bond must be equal to the amount of the judgment plus costs, but it may be higher at the discretion of the Justice of the Peace. 10 <u>Del.C.</u>, §9571(b).

With regard to defendant-appellants, there is one notable exception to the above rule: The bond requirement is waivable with regard to those defendants who can prove to the Justice of the Peace their destitute condition. Lecates v. Justice of the Peace Court No. 4, 637 F.2d 898 (3d Cir., 1980); Policy Directive 81-032, dated January 9, 1981, An Indigent's Right To Appeal In Civil Cases.

Question 3: When security is required, when must it be offered so as to perfect an appeal?

Answer: Security, when required, must be offered "within 15 days from the day of giving the judgment and not after, counting that day as one. . . ." 10 Del.C., §9571.

The specific question raised above was considered by Judge Bernard Balick in the case of Winter v. Clifton, Del.Super., 82C-NO-49, letter opinion by J. Balick dated November 2, 1983. There, a Justice of the Peace denied reargument under a judgment previously rendered. The order denying reargument was issued on October 6, 1982. The decision was mailed to Winter's counsel who received it on October 13, 1982. The next day, he sought to have the Justice of the Peace set the amount of security on appeal. This was done on October 15, 1982. Notwithstanding his diligent effort, counsel was unable to obtain a surety bond until October 21, 1982. This was 9 days from the day of receiving notice of the court's decision denying reargument, counting the day that notice was received as day one. But it was one day late if October 6, 1982 is counted as the first day of the 15 day period for offering appeal. Clifton moved to dismiss the appeal. The motion was granted by Judge Balick:

"Since there is no provision for extending the statutory time period when the court's decision is mailed to a party, it follows that there will be less than 15 days from the date of receiving the decision by mail in which to offer the required surety. Although the clerk did not comply with the requirement of Justice of the Peace Civil Rule 19(j)² that the clerk shall make a note in the docket of the mailing immediately upon the entry of an order or judgment, in response to this court's request that the record be supplemented to show the date of mailing, the clerk has certified that to the best of the court's knowledge, the

Rule 19(j) of the Justice of the Peace Court Rules of Civil Procedure provides that:

"(j) Notice of Order or Judgment. Immediately upon the entry of an order or judgment, the clerk shall serve a notice of the entry and the time and manner of appeal by mail upon every party affected thereby, and shall make a note in the docket of the mailing."

(Emphasis added.)

decision was mailed on October 6, in accordance with the court's standard practice of dating judgment letters as of the date that they are mailed. It is of course important to follow this practice, so that the losing party will have a reasonable amount of time after receiving notice of a decision to perfect an appeal. Cf. 10 Del.C., §9505.3 Although there is no such requirement in the rules, it would seem desirable that the clerk attempt to notify the losing party by telephone when a decision is being mailed. 4 While it is possible that a party will be unable to obtain the required security when the full 15 days is available to do so, the likelihood of this happening will increase as the available time becomes shorter.

I have no basis for finding that any day other than October 6 was 'the date of giving the judgment.' Thus appellant had until October 20 in which to offer security. For some unknown reason, the court's decision in this case was not delivered until October 13. Unfortunately, appellant was unable to obtain security within the 8 days that he then had left to comply with the statutory requirement. I therefore have no alternative consistent with the controlling statutes and case law to dismissing this appeal because appellant did not meet the jurisdictional requirement of offering security within the statutory time period."

The <u>Winter</u> case is consistent with prior Delaware law. In the case of <u>Warren Williams Co. v. Giovannozzi</u>, Del.Super., 295 A.2d 587 (1972), Judge Albert Stiftel dismissed a civil appeal where the defendant did not post the required security until three days after

Ten Del.C., §9505 states that "All justices of the peace in this State, after passing judgment in all civil and criminal cases, shall immediately advise the party litigants in civil cases and defendants in criminal cases of their right to take an appeal from the decision of the justice of the peace and shall inform all party litigants and defendants of the time and manner in which the appeal shall be taken. The records of the justice of the peace shall contain an entry indicating the information given by the justice of the peace."

⁴At the very least, every effort should be made to ensure that the decision/judgment is dated as of the date that it is mailed.

the expiration of the 15 day time limit for taking an appeal. Judge Stiftel opined that the subsection pertaining to the appeal time (§9571(a)) and the subsection pertaining to security (§9571(b)) are not separate. He concluded that they go together, citing II Woolley Delaware Practice, §1421, which states:

"Notwithstanding a party has fifteen days from the entry of the judgment by the justice within which to move for an appeal and enter security. . . . " (Emphasis added.)

Judge Stiftel concluded that the appeal is timely perfected only when the security, the amount thereof having been set by the Justice of the Peace, is entered. If security is not properly entered within the fifteen day appeal period, the Superior Court must dismiss the appeal.

Question 4: If the time for filing an appeal from a Justice of the Peace Court judgment on a civil action is 15 days, what is the reference to a 20 day period in which to file the appeal in the Superior Court?

Answer: Ten Del.C., §9571(a) refers to the 15 day appeal period. As stated, an appeal is allowed by a Justice of the Peace if notice thereof and necessary security is filed with the Justice of the Peace Court within 15 days from the date of judgment.

Rule 3(c) of the Superior Court Rules of Civil Procedure speaks to the commencement of actions where the action is tried de novo. Rule 3(c) states that such an action is commenced in the Superior Court by the appellant filing with the Prothonotary a praecipe and a certified transcript of the record within 20 days of the date of the allowance of the appeal.

The above-referenced statute and Rule explain the two time limitations. First, to ensure the allowance of an appeal, notice thereof and any necessary security must be filed with the Justice of the Peace Court within 15 days of the judgment. The appeal is then allowed. From the date of such an allowance, the appellant has 20 days to file with the Prothonotary a praecipe and certified transcript of the record so as to commence the action in the Superior Court.

Question 5: What are the appeal procedures with regard to trespass and replevin actions?

Answer: The same as with regard to debt actions. As to Justice of the Peace Court trespass actions, 10 <u>Del.C.</u>, §9614 states, in pertinent part, that:

"In all cases of trespass, . . . there shall be the same right of appeal to Superior Court as in other civil actions."

As to replevin actions, 10 Del.C., §9640 states that:

"Appeals shall be allowed from judgments given by justices of the peace under this subchapter, to the Superior Court. Such appeals shall be taken, docketed and dismissed in the same manner as is provided by law for the taking, docketing and dismissing of appeals from justices of the peace in civil actions for debt."

Question 6: When security is offered in the form of a surety bond, must the surety sign the entry of security?

Answer: Yes. If the surety does not sign the entry of security, it is void and of no effect whatsoever. With regard to debt actions, 10 Del.C., §9572(b) states:

"(b) The entry of security shall be signed by the sureties or it shall be void."

As to trespass actions, 10 Del.C., §9615(d) states:

"(d) The entry [of security] shall be signed by the surety, or it shall be void."

By virtue of 10 <u>Del.C.</u>, §9640, 10 <u>Del.C.</u>, §9572(b) applies to replevin actions.

In brief, whenever a surety bond is offered with regard to an appeal from a Justice of the Peace Court civil case, the Court must ensure that the bond has been executed by the named surety or sureties.

NAB:pn

CC: The Honorable Daniel L. Herrmann
The Honorable Grover C. Brown
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
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